UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

LEO MUSE

Defendant.

SENTENCING MEMORANDUM
IND. NO.: 5:05-CR-446

The sentencing in the instant case raises the following questions:

Does Harris v. United States, 536 U.S. 545 (2002) preclude the District Judge from making a finding as to the amount of drugs alleged in the indictment triggering the mandatory minimum sentence beyond a reasonable doubt under Apprendi, Blakely, Booker, Rita and Cunningham.? Or is Harris limited to mandatory minimum sentences that are not essential elements of the crime charged in the indictment but rather factors that are traditionally considered enhancing sentencing facts?

The Supreme Court has held in Apprendi v. New Jersey, 530 U.S. 466 (2000), Blakely v. Washington, 124 S.Ct. 2531 (2004) etc., that a statutory maximum sentence is based on facts found by the jury verdict or admitted to by the defendant and not necessarily the maximum sentence authorized by law. In Harris, supra, the Supreme Court said mandatory minimums are acceptable if within the authorized sentence by the jury verdict and by statutory construction are traditionally sentencing enhancing facts as opposed to facts that would be essential to find guilt of the offense alleged in the indictment. So, in Harris, (which was a bench trial) the judge had the evidence of a sentencing enhancing fact of "brandishing a gun" before him at trial. The judge did not need to find this fact to impose the minimum sentence because this finding was not an essential element of the gun charge in the indictment. In the instant case the statutory scheme of drug prosecution has made the amount of drugs alleged in the indictment an essential element of the crime thus distinguishing this case from Harris. See, United States v. Gonzalez, 420 F3d 11 (2nd Cir. 2005.) The Second Circuit in Gonzalez specifically distinguished Harris for the very reason cited above:

> As our earlier discussion of § 841 demonstrates, see supra at Part II.B.1.a, that statute, unlike 18 U.S.C. § 924(c)(1)(A), does not use a fact (drug quantity) simply to identify increasing minimum sentences within a penalty scheme with a fixed maximum. Instead, when drug quantity raises a mandatory minimum sentence under § 841, it simultaneously raises a corresponding maximum, thereby increasing a defendant's authorized sentencing range above what it would have been if he had been convicted of an identical unquantified drug crime. The Apprendi rule is, and after Harris remains, that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." United States v. Apprendi, 530 U.S. at 490 (internal quotation marks omitted) (emphasis added). It would turn this rule on its head to conclude that a fact, such as drug quantity, which unquestionably increases the "range of penalties to which a criminal defendant is exposed," is not an element of the crime that must be pleaded and proved beyond a reasonable doubt (or admitted by the defendant) because it increases the mandatory minimum sentence as well as the maximum. Harris simply does not speak to that circumstance. It holds that, where a fact "alter[s] only the minimum" sentence, without "authoriz[ing] the judge to impose [a] . . . higher penalt[y]," the constitution permits the fact to be treated as a sentencing factor.
> United States v. Gonzalez, supra at 126-127.

It is clear that this Court should make a finding as to the amount of heroin the defendant Muse is responsible for beyond a reasonable doubt.

DUE PROCESS

Muse contends that any evidence offered by the government as to the amount of drugs Muse was responsible for cannot be hearsay from co-conspirators who incriminated Muse to agents in 5K.1 debriefing sessions. Crawford v. Washington, 124 S.Ct. 1354 (2004); United States v. Martinez, 413 F3d 239 (2nd Cir. 2005). It is submitted that the amount of drugs that can be inferred from 90 days of wiretap conversations recorded during the middle of the conspiracy and the heroin obtained as a result of a search executed toward the end of the conspiracy do not tend to support the amount of drugs the co-conspirators allege Muse was responsible for. In fact, such evidence works as a "reverse reliability" factor.

In Martinez, supra, the Second Circuit held that Due Process requires that some minimal indicia of reliability accompany a hearsay statement citing United States v. Egge 223 F2d 1128, 1132, which said that inadmissible evidence cannot be considered at sentencing if it lacks sufficient indicia of reliability to support its probable accuracy. In the present case the independent evidence is not corroborative of the co-conspirators' statements and in fact refutes said statements. The statements standing alone have no indicia of reliability as it is submitted that the incentive of the co-conspirators at 5K.1 debriefing sessions is to be treated more leniently depending on the amount of assistance they can provide in the prosecution of others. It is certainly reasonable to infer that such motivation to "puff up" exists with co-conspirators. Such testimony must be confronted or not allowed as part of Due Process at the sentencing hearing.

ADJUSTMENT FOR ROLE IN THE OFFENSE

In the Presentence Report (¶21) Probation adds three points by describing Muse as a manager or supervisor of a conspiracy which involved five or more participants. The report concludes that co-conspirators mentioned in ¶12 were employed by Muse and co-defendant Hilliard to obtain and transport heroin from New Jersey to Syracuse and be paid mostly with heroin. It is submitted that the evidence the report relies on to reach the above conclusion is primarily debriefing sessions that the alleged co-conspirators had with government agents where the co-conspirators were providing substantial assistance with hopes of receiving a more lenient sentence. The wiretap evidence and search warrant evidence do not corroborate the amount of drugs involved in the conspiracy as stated by the three co-conspirators nor do they show supervision or management. Nor should these statements be considered in enhancing Muse's sentence by adjusting his role in the offense without giving Muse the opportunity to confront this evidence in an adversarial setting under Due Process under the Fifth Amendment.

MUSE'S CRIMINAL HISTORY

The defendant Muse contends that the probation report is in error by attributing a criminal history point for a July 12, 2002 plea to Unlawful Possession of Marijuana with an unknown docket number. This point makes Muse's criminal history category at a 2. It is submitted that under §4A1.2(c) the unlawful possession charge of marijuana in new York State is more similar to a minor traffic infraction or public intoxication; the maximum punishment for the unlawful possession of marijuana is a civil fine of $100.00 This is more akin to a speeding ticket than a crime and should not count.

The Introductory Comment to the Criminal History chapter of the sentencing guidelines notes that it deals with "prior criminal behavior." It is submitted that a first Unlawful Possession of Marijuana charge is not criminal behavior in New York State. It must be noted that New York State Penal Law §221 *et seq* makes a clear distinction between "Unlawful Possession of Marijuana" (§221.05) and "Criminal Possession of Marijuana" (PL §221.10 *et seq.*) In passing the Marijuana Reform Act of 1977, the Legislature noted, "The legislature finds that arrests, criminal prosecutions and criminal penalties are inappropriate for people who possess small quantities of marijuana…" (Legislative Findings and Statement of Purposes of L.1977, c. 360, §1 (emphasis added)).

A distinction should be noted that in order to qualify as a "violation" it should be for a Penal Law violation.[1] An Unlawful Possession of Marijuana is not a Penal Law violation until someone

1 The fact that it is listed under the Penal Law statutes does not inherently make the charge countable in terms of Criminal History points. Disorderly Conduct, for example, is listed in the Penal Law but is not counted for

commits two Unlawful Possession of Marijuana charges under New York Law. See, Penal Law §221.05. Therefore the Unlawful Possession of Marijuana charge would not be considered a "violation" in the same senses that a "violation" is an offense under the Penal Law. Any Unlawful Possession of Marijuana is a violation of a law that is more akin to a traffic violation which is the most analogous statute to which the Unlawful Possession of Marijuana can be compared.

To the extent the Court believes it should count under the guidelines it is submitted that the Criminal History category of 2 overstates the seriousness of Muse's criminal history under the guidelines. The only other point is a misdemeanor simple assault in New Jersey almost ten years ago where Muse paid a fine of $180.00

FACTORS THAT MAY WARRANT A NON-GUIDELINE SENTENCE

Although the Probation Report gives data under the heading "Offender Characteristics" that contain factors germane to §3553(a) factors in considering what the appropriate sentence should be the report does not analyze any of these factors and instead of a sentencing memo becomes just a calculation of the guidelines as though the Guidelines have more weight than §3553(a) factors. It is submitted that the law post-Rita (Rita v. United States __S.Ct__, 2007 WL 1772146 (U.S.)) in the Second Circuit affords the guidelines no preferred position. See, United States v. Goodwin, 2007 WL 2045880 (holding that there is no presumption the guidelines are reasonable post-Rita.)

s/Frank Policelli

FRANK POLICELLI, ESQ.

Criminal History purposes.